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4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 RODNEY E. FLITCROFT JR.,

7 Plaintiff,

8 v.

9 NANCY A. BERRYHILL, Deputy
Commissioner of Social Security for
Operations,

10 Defendant.
11

Case No. 2:17-cv-01149-TLF

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

12 Plaintiff has brought this matter for judicial review of defendant's denial of his
13 application for disability insurance benefits and supplemental security income benefits. The
14 parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C.
15 § 636(c), Federal Rule of Civil Procedure 73; Local Rule MJR 13. For the reasons set forth
16 below, the Court reverses and remands defendant's decision to deny benefits for further
17 administrative proceedings.

18 FACTUAL AND PROCEDURAL HISTORY

19 On June 10, 2013, plaintiff filed an application for disability insurance benefits and
20 supplemental security income benefits alleging that he became disabled beginning December 31,
21 2002. Dkt. 9, Administrative Record (AR) 252-258, 259-267. The claim was denied on initial
22 administrative review and on reconsideration. AR 145-47, 152-53, 155-56, 157-58. A hearing
23 was held on May 10, 2016, before ALJ Glenn G. Meyers, at which plaintiff appeared and
24 testified, as did vocational expert Steven R. Cardinal. AR 41-80, 159-160.
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1 In a written decision dated February 13, 2017, the ALJ documented his analysis at each
2 of the five steps of the Commissioner's sequential disability evaluation process. AR 15-40. At
3 the first step, the ALJ considers whether the claimant is engaged in "substantial gainful activity."
4 *Kennedy v. Colvin*, 738 F.3d 1172, 1175 (9th Cir. 2013) (citing C.F.R. § 416.920(a)(4)). At the
5 second step, the ALJ considers "the severity of the claimant's impairments. *Id.* The third step
6 asks whether the claimant's impairment or combination of impairments meets or equals a listing
7 under 20 C.F.R. pt. 404, subpt. P, app. 1." *Id.* "If so, the claimant is considered disabled and
8 benefits are awarded, ending the inquiry." *Id.* If not, the ALJ considers the claimant's residual
9 functional capacity ("RFC") "in determining whether the claimant can still do past relevant
10 work" at step four, "or make an adjustment to other work" at step five. *Id.*

11 Steps one and two were resolved in plaintiff's favor. AR 20. The ALJ found that plaintiff
12 had the following severe impairments: arthritis of the right upper extremity, depressive disorder
13 with psychotic features, anxiety disorder with panic attacks, status post-surgery for cerebral
14 trauma, substance addiction disorder, cognitive disorder, posttraumatic stress disorder, and
15 hearing disorder. AR 21. At step three, the ALJ found that plaintiff did not have an impairment
16 or combination of impairments that met or medically equaled the severity of one of the listed
17 impairments. AR 22. The ALJ next considered plaintiff's residual functional capacity (RFC) and
18 found at step four that plaintiff could not perform his past relevant work, but that at step five he
19 could perform other jobs that exist in significant numbers in the national economy, and therefore,
20 he was not disabled at that step. AR 32-33.

21 Plaintiff's request for review was denied by the Appeals Council on May 24, 2017,
22 making the ALJ's decision the final decision of the Commissioner, which plaintiff then appealed
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1 in a complaint filed with this Court on July 27, 2017. AR 1-7, 251; Dkt. 1, 4; 20 C.F.R. §§
2 404.981, 416.1481.

3 Plaintiff seeks reversal of the ALJ's decision and remand for an award of benefits, or in
4 the alternative for further administrative proceedings, arguing the ALJ erred: (1) in evaluating
5 the medical opinion evidence of treating psychiatrist David Rowlett, M.D. and three examining
6 psychologists, James Czysz, Psy.D., William Wilkinson Ed.D., and David Mashburn Ph.D.; and
7 (2) in evaluating plaintiff's RFC. Dkt. 10.

8 DISCUSSION

9 The Court will uphold an ALJ's decision unless: (1) the decision is based on legal error;
10 or (2) the decision is not supported by substantial evidence. *Revels v. Berryhill*, 874 F.3d 648,
11 654 (9th Cir. 2017). Substantial evidence is "such relevant evidence as a reasonable mind might
12 accept as adequate to support a conclusion." *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir.
13 2017) (quoting *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir.
14 1988)). This requires "more than a mere scintilla," though "less than a preponderance" of the
15 evidence. *Id.* (quoting *Desrosiers*, 846 F.2d at 576).

16 If more than one rational interpretation can be drawn from the evidence, then the Court
17 must uphold the ALJ's interpretation. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). "Where
18 there is conflicting evidence sufficient to support either outcome," the Court "must affirm the
19 decision actually made." *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984) (quoting *Rhinehart*
20 *v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971)). The Court may not affirm by locating a quantum of
21 supporting evidence and ignoring the non-supporting evidence. *Orn v. Astrue*, at 630.

22 The Court must consider the administrative record as a whole. *Garrison v. Colvin*, 759
23 F.3d 995, 1009 (9th Cir. 2014). The Court is required to weigh both the evidence that supports,
24 and evidence that does not support the ALJ's conclusion. *Id.* The Court may not affirm the
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1 decision of the ALJ for a reason upon which the ALJ did not rely. *Id.* Rather, only the reasons
2 identified by the ALJ are considered in the scope of the Court’s review. *Id.*

3 I. ALJ’s Evaluation of the Medical Opinion Evidence

4 Plaintiff challenges the ALJ’s decision rejecting the opinion of treating psychiatrist, Dr.
5 Rowlett, and three examining psychologists, Drs. Czysz, Wilkinson, and Mashburn.

6 Three types of physicians may offer opinions in Social Security cases: “(1) those who
7 treat[ed] the claimant (treating physicians); (2) those who examine[d] but d[id] not treat the
8 claimant (examining physicians); and (3) those who neither examine[d] nor treat[ed] the claimant
9 (non-examining physicians).” *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). A treating
10 physician’s opinion is generally entitled to more weight than the opinion of a doctor who
11 examined but did not treat the plaintiff, and an examining physician’s opinion is generally
12 entitled to more weight than that of a non-examining physician. *Id.* A non-examining physician’s
13 opinion may constitute substantial evidence if “it is consistent with other independent evidence
14 in the record.” *Id.* at 830-31. An ALJ need not accept the opinion of a treating physician, “if that
15 opinion is brief, conclusory, and inadequately supported by clinical findings” or “by the record
16 as a whole.” *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004); *see*
17 *also Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Tonapetyan v. Halter*, 242 F.3d
18 1144, 1149 (9th Cir. 2001).

19 Even when a treating or examining physician’s opinion is contradicted, an ALJ may only
20 reject that opinion “by providing specific and legitimate reasons that are supported by substantial
21 evidence.” *Trevizo v. Berryhill*, 871 F.3d 664, 675 (9th Cir. 2017) (quoting *Ryan v. Comm’r of*
22 *Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008)). However, the ALJ “need not discuss *all*
23 evidence presented” to him or her. *Vincent on Behalf of Vincent v. Heckler*, 739 F.2d 1393,
24 1394-95 (9th Cir. 1984) (internal citation omitted) (emphasis in original). The ALJ must only
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1 explain why “significant probative evidence has been rejected.” *Id.*

2 “[A]n ALJ errs when he rejects a medical opinion or assigns it little weight while doing
3 nothing more than ignoring it, asserting without explanation that another medical opinion is more
4 persuasive, or criticizing it with boilerplate language that fails to offer a substantive basis for his
5 conclusion.” *Garrison v. Colvin*, 759 F.3d 995, 1012-13 (9th Cir. 2014) (citing *Nguyen v.*
6 *Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996)).

7 a. Dr. Rowlett, treating psychiatrist

8 On May 10, 2016, Dr. Rowlett completed a mental residual functional capacity
9 assessment regarding plaintiff’s mental health impairments and limitations and his ability to
10 sustain activity over a normal work day and work week. AR 1118-19. Dr. Rowlett opined that
11 plaintiff’s functional limitations ranged from moderate to marked, with marked¹ social
12 limitations and difficulties maintaining concentration, persistence, and pace. AR 1118-19. In a
13 mental impairment questionnaire, Dr. Rowlett listed plaintiff’s diagnoses as major depressive
14 disorder (recurrent moderate), post-traumatic stress disorder (PTSD), cognitive disorder,
15 hepatitis C, traumatic brain injury, and opioid dependence. AR 1120. Dr. Rowlett opined that
16 work-related stressors would increase plaintiff’s level of impairment and assigned a GAF score
17 of 42. AR 1121.

18 Several months later, in October 2016, Dr. Rowlett wrote a letter opining that plaintiff
19 was unable to obtain and/or sustain even part-time employment. AR 1123-24. Dr. Rowlett also
20 stated that plaintiff experienced feelings of being overwhelmed by stimuli, was isolative, his
21 complex attention had declined, he struggled with reading, and his impaired learning capacity

23 ¹ Marked limitations are defined as “more than moderate, but less than extreme. A marked limitation may arise
24 when several activities or functions are impaired, so long as the degree of limitation is such as to seriously interfere
25 with the ability to function independently, appropriately and effectively.” AR 1119.

1 markedly limited adaptation. AR 1123. Dr. Rowlett noted that plaintiff's limitations were due to
2 a traumatic brain injury, neurocognitive disorder, PTSD, and depression. *Id.*

3 The ALJ gave Dr. Rowlett's opinion little weight for several reasons. AR 30-31.
4 Defendant concedes error to all of the ALJ's reasons, except for the following: (1) Dr. Rowlett's
5 opinion was inconsistent with the objective medical evidence and (2) Dr. Rowlett failed to cite
6 any clinical support for his opinion and relied heavily on plaintiff's subjective complaints. AR
7 30-31.

8 1. *Inconsistent with Medical Evidence*

9 First, the ALJ found that: "The assessment that the claimant could not obtain/maintain
10 employment is not consistent with the relatively normal mental health status examinations and/or
11 treatment" AR 31. Defendant argues that the ALJ found that Dr. Rowlett's opinion was
12 inconsistent with the longitudinal record, and cites to various treatment notes from other medical
13 providers showing that plaintiff was oriented, could concentrate, and that his memory was intact.
14 Dkt. 11 at 5-6 (citing AR 613, 622, 754, 764, 793, 810, 819, 884, 893, 905, 908, 911, 943).
15 Plaintiff argues that the ALJ did not offer this explanation or citation to the record, and defendant
16 cannot cure the ALJ's error in his brief.

17 The ALJ is required to give detailed, reasoned, and legitimate reasons for disregarding
18 findings by a treating physician; conclusory reasons are insufficient. *Burrell v. Colvin*, 775 F.3d
19 1133, 1137 (9th Cir. 2014); *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988); An ALJ's
20 rejection of a physician's opinion on the ground that it is contrary to clinical findings in the
21 record is "broad and vague," and fails "to specify why the ALJ felt the treating physician's
22 opinion was flawed". *McAllister v. Sullivan*, 888 F.2d 599, 602 (9th Cir. 1989). It is not the job
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1 of the reviewing court to comb the administrative record to find specific conflicts. *Burrell*, 775
2 F.3d at 1138.

3 Here, although defendant cites to numerous treatment notes in the record from other
4 medical providers, Dkt. 11 at 5, the ALJ did not cite to those notes, nor did he elaborate on *which*
5 “relatively normal mental status examinations and/or treatment” conflicted with *which* part of
6 Dr. Rowlett’s opinion. AR 31. It is not clear from the ALJ’s decision whether he was referring to
7 an internal inconstancy with Dr. Rowlett’s own treatment notes, or that he was rejecting Dr.
8 Rowlett’s opinion on the basis that it was inconsistent with the longitudinal record. *See* AR 31.
9 Such conclusory reasoning constitutes an insufficient basis on which to give little weight to Dr.
10 Rowlett’s opinion.

11 2. *Plaintiff’s Self-Reports*

12 Second, the ALJ found that Dr. Rowlett did not support the opined limitations with
13 narrative information or explanations or cite to any specific mental status examination(s)
14 (MSE(s)) or objective testing. AR 30-31. The ALJ found that Dr. Rowlett relied heavily on
15 plaintiff’s complaints, particularly in terms of limits in concentration and word finding difficulty.
16 AR 31. Plaintiff argues that the ALJ separated Dr. Rowlett’s assessment from the narrative
17 statement he provided, and that Dr. Rowlett performed MSEs which he reasonably relied on in
18 preparing his assessment. Defendant argues that Dr. Rowlett simply checked a series of boxes
19 without elaboration or reference to clinical findings and relied heavily on plaintiff’s subjective
20 complaints in forming his opinion.

21 An ALJ need not accept the opinion of a treating physician, “if that opinion is brief,
22 conclusory, and inadequately supported by clinical findings” or “by the record as a whole.”
23 *Batson*, 359 F.3d at 1195. And, “[an] ALJ may reject a treating physician’s opinion if it is based
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1 ‘to a large extent’ on a claimant’s self-reports that have been properly discounted as incredible.”
2 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (quoting *Morgan v. Comm’r. Soc.*
3 *Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999) (citing *Fair v. Bowen*, 885 F.2d 597, 605 (9th
4 Cir. 1989)).

5 This situation is distinguishable from one in which the doctor describes his or her own
6 observations in support of the assessments and opinions. *See Ryan*, 528 F.3d at 1199-1200 (“an
7 ALJ does not provide clear and convincing reasons for rejecting an examining physician’s
8 opinion by questioning the credibility of the patient’s complaints where the doctor does not
9 discredit those complaints and supports his ultimate opinion with his own observations”); *see*
10 *also Edlund v. Massanari*, 253 F.3d 1152, 1159 (9th Cir. 2001). According to the Ninth Circuit,
11 “when an opinion is not more heavily based on a patient’s self-reports than on clinical
12 observations, there is no evidentiary basis for rejecting the opinion.” *Ghanim v. Colvin*, 763 F.3d
13 1154, 1162 (9th Cir. 2014) (citing *Ryan*, 528 F.3d at 1199-1200).

14 The Ninth Circuit clarified that professional assessment of mental illness is different from
15 professional assessment of physical illness, and observed that psychiatric evaluations necessarily
16 analyze a patient’s self-reports:

17 [A]s two other circuits have acknowledged, “[t]he report of a psychiatrist should
18 not be rejected simply because of the relative imprecision of the psychiatric
19 methodology.” . . . Psychiatric evaluations may appear subjective, especially
20 compared to evaluation in other medical fields. Diagnoses will always depend in
21 part on the patient's self-report, as well as on the clinician's observations of the
22 patient. But such is the nature of psychiatry. . . . Thus, the rule allowing an ALJ to
23 reject opinions based on self-reports does not apply in the same manner to
24 opinions regarding mental illness.

25 *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017) (quoting *Blankenship v. Bowen*, 874 F.2d
1116, 1121 (6th Cir. 1989)) (internal citations omitted). Thus, “when mental illness is the basis
of a disability claim, clinical [findings] may consist of the diagnoses and observations of

professionals trained in the field of psychopathology.” *Sanchez v. Apfel*, 85 F.Supp.2d 986, 992 (C.D. Cal. 2000); *see also Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (an opinion based on clinical observations supporting a diagnosis of depression is competent [psychiatric] evidence). Both a clinical interview and an MSEs are “objective measures” that “cannot be discounted as a ‘self-report.’” *Buck*, 869 F.3d at 1049 (9th Cir. 2017) (finding a clinical interview and mental status evaluation to be “objective measures” that “cannot be discounted as a ‘self-report’”).

Further, discrediting a doctor’s opinion simply because he used a check box form is not valid unless that opinion is inconsistent with the underlying clinical records. *See Garrison v. Colvin*, 759 F.3d 995, 1014 n.17 (9th Cir. 2014) (“the ALJ was [not] entitled to reject [medical] opinions on the ground that they were reflected in mere check-box forms” where the “check-box forms did not stand alone” but instead “reflected and were entirely consistent with the hundreds of pages of treatment notes”); *see also Neff v. Colvin*, 639 F. App’x 459 (9th Cir. 2016) (unpublished); *Esparza v. Colvin*, 631 F. App’x 460, 462 (9th Cir. 2015) (unpublished).

Here, Dr. Rowlett provided an adequate explanation to substantiate his assertions that plaintiff has disabling mental functional limitations. First, Dr. Rowlett submitted a narrative letter and provided an explanation of his opined limitations. AR 1123-24. In addition, between December 2014 and September 2016, Dr. Rowlett met with plaintiff ten times, and his treatment notes include medical findings to support his conclusions. AR 1086-1117, 1120, 1123. During this time period, Dr. Rowlett performed several MSEs, listing a number of results. For example, on March 9, 2015, Dr. Rowlett found that plaintiff’s judgment/insight was “four to limited,” and that plaintiff had decreased memory, some difficulty maintaining flow of thought, slow speech with occasional hesitancy, and a depressed and anxious mood. AR 1115. On September 22,

1 2015, Dr. Rowlett conducted another MSE and found that plaintiff had impaired immediate,
2 recent and remote memory, intellectual functioning, judgment/reasoning, insight, fund of
3 knowledge, dysphoric and anxious mood, constricted affect and latent speech. AR 1093. On May
4 6, 2016, Dr. Rowlett's treatment notes demonstrate similar findings. AR 1086 (observing that
5 plaintiff had an anxious mood, as well as impaired recent and remote memory,
6 judgment/reasoning, fund of knowledge, and insight).

7 Therefore, the ALJ committed legal error by discounting Dr. Rowlett's opinion due to a
8 supposed lack of clinical findings as well as a purportedly problematic reliance on plaintiff's
9 self-reports. Here, Dr. Rowlett's opinion was based on clinical interviews and the objective
10 results of several MSEs that were consistent with his treatment notes. *See Buck*, 869 F.3d at
11 1049 (internal citations omitted); *See Garrison*, 759 F.3d at 1014 n.17. Thus, the ALJ's
12 reasoning that Dr. Rowlett's assessment was not supported by clinical findings and based largely
13 on plaintiff's self-reported symptoms is neither legally supported, nor based on substantial
14 evidence. *See Lester*, 81 F.3d at 830-31 (when an examining physician's opinion is contradicted,
15 that opinion can be rejected "for specific and legitimate reasons that are supported by substantial
16 evidence in the record").

17 3. Harmless Error

18 "[H]armless error principles apply in the Social Security context." *Molina v. Astrue*, 674
19 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless if it is not prejudicial to the claimant or
20 "inconsequential" to the ALJ's "ultimate nondisability determination." *Stout v. Commissioner*,
21 *Social Security Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674 F.3d at 1115. The
22 determination as to whether an error is harmless requires a "case-specific application of
23 judgment" by the reviewing court, based on an examination of the record made "without regard
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1 to errors' that do not affect the parties' 'substantial rights.'" *Molina*, 674 F.3d at 1118-19
2 (*quoting Shinseki v. Sanders*, 556 U.S. 396, 407 (2009)).

3 In the RFC assessment, the ALJ found, in relevant part, that plaintiff "is capable of
4 engaging in unskilled, repetitive, routine tasks in two-hour increments[.]" AR 24. Had the ALJ
5 fully given credit to Dr. Rowlett's opinion, the RFC would have also included additional
6 limitations. As the ALJ's ultimate determination regarding disability was based on the testimony
7 of the vocational expert in response to an improper hypothetical, the error affected the ultimate
8 disability determination and was not harmless.

9 b. Dr. Czysz, examining psychologist

10 Dr. Czysz performed two psychological evaluations at the request of the Washington
11 State Department of Social and Health Services on March 27, 2013, and April 22, 2015. AR 528-
12 533, 1012-1019. The limitations Dr. Czysz found ranged from mild to marked, with a marked
13 limitations² in performing activities within a schedule, maintaining regular attendance, and being
14 punctual within customary tolerances, communicating and performing effectively in a work
15 setting, adapting to changes in a routine work setting, completing a normal work day/work week
16 without interruptions from psychologically based symptoms, and setting realistic goals and
17 planning independently. AR 530-531; 1014.

18 The ALJ gave substantial weight to Dr. Czysz's opinion of plaintiff's mild to moderate
19 limitations because they were supported by the record. AR 29. However, the ALJ gave only little
20 weight to the marked limitations and GAF score of 45³ Dr. Czysz assigned. AR 29. The ALJ

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22 ² A marked limitation is defined as a "very significant limitation on the ability to perform one or more basic work activity." AR 530.

23 ³ A GAF score is "a subjective determination based on a scale of 100 to 1 of 'the [mental health] clinician's
24 judgment of the individual's overall level of functioning.'" *Pisciotta v. Astrue*, 500 F.3d 1074, 1076 n.1 (10th Cir.
25 2007) (*quoting* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Text
Revision 4th ed. 2000) ("DSM-IV-TR") at 32); *see also Vargas v. Lambert*, 159 F.3d 1161, 1164 n.2 (9th Cir. 1998)

1 reasoned that Dr. Czysz's opinion: (1) Dr. Czysz's opinion was based on plaintiff's self-reports
2 and was internally inconsistent; (2) Dr. Czysz failed to take into consideration plaintiff's history
3 of substance abuse; (3) Dr. Czysz only had "brief contact" with plaintiff and not for treatment
4 purposes; and (4) Dr. Czysz was optimistic about plaintiff's recovery and believed that his
5 impairments would improve within a short duration with treatment. AR 29.

6 Plaintiff argues that the ALJ erred in assigning partial weight to Dr. Czysz's findings,
7 including little weight to the marked limitations.

8 1. *Plaintiff's Self-Reports and Internal Inconsistencies*

9 First, the ALJ found that the marked limitations were not substantiated by explicit factors
10 and reflected plaintiff's subjective complaints. AR 29. For example, the ALJ noted that plaintiff
11 was able to recall three words on immediate recall, but responded correctly to judgment
12 questions and his thought processes and content were not within normal limits only due to
13 plaintiff's self-reports of hearing voices. *Id.* Moreover, the ALJ found that in 2015, plaintiff's
14 concentration improved and his thought process was linear and well-directed without evidence of
15 a thought disorder, which was not suggestive of marked limitations. AR 29.

16 As discussed above, "[an] ALJ may reject a treating physician's opinion if it is based 'to
17 a large extent' on a claimant's self-reports that have been properly discounted as incredible."
18 *Tommasetti*, 533 F.3d at 1041 (internal citations omitted). Here, however, Dr. Czysz conducted a
19 clinical interview and MSE in 2013, and another clinical interview and MSE in 2015. The 2013
20 MSE showed plaintiff's thought process and content, memory, insight and judgment, and
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23 ("A GAF score is a rough estimate of an individual's psychological, social, and occupational functioning used to
24 reflect the individual's need for treatment."). "A GAF score of 41-50 indicates '[s]erious symptoms . . . [or] serious
25 impairment in social, occupational, or school functioning,' such as an inability to keep a job." *Pisciotta*, 500 F.3d at
1076 n.1 (10th Cir. 2007) (quoting DSM-IV-TR at 34).

1 concentration did not fall within normal limits. AR 533. The 2015 MSE revealed similar
2 abnormal findings. AR 1016.

3 Dr. Czysz also reported his own observations in support of his assessments and opinions.
4 *See Ryan*, 528 F.3d at 1199-1200. For example, during the 2013 interview and exam. Dr. Czysz
5 observed that plaintiff was “quite depressed[,]” and presented disheveled. AR 531-32. During
6 the 2015 interview and MSE, Dr. Czysz observed that plaintiff was paranoid and socially
7 withdrawn, and that while his speech was adequately developed, it was sometimes hesitant, and
8 plaintiff was depressed. AR 1015. In finding that plaintiff’s thought process and content were not
9 wholly within normal limits, Dr. Czysz observed that plaintiff’s thought process was linear, yet
10 thought content was notable for depressive rumination, self-criticism, negative focus, paranoia
11 and auditory hallucinations. AR 1015.

12 In finding that plaintiff’s perception was not within normal limits, Dr. Czysz observed
13 that plaintiff demonstrated difficulty in distinguishing between internally generated events and
14 objective sensory perception. AR 1016. Dr. Czysz also observed that plaintiff’s memory was
15 impaired, noting that he was able to recall three words in immediate recall but only two words on
16 delayed recall. AR 532, 1016. Dr. Czysz observed that plaintiff’s capacity for planning and
17 executing executive functions was moderately impaired. AR 1016. No part of Dr. Czysz’s
18 evaluation questioned or discredited plaintiff’s reports, and in fact, Dr. Czysz noted that
19 psychological testing suggested good effort. *See* AR 528-33; 1012-1019.

20 These are objective measures, consistent with Dr. Czysz’s findings, and the ALJ gave no
21 specific and legitimate reason for rejecting these findings. *See Buck v. Berryhill*, 869 F.3d 1040,
22 1049 (9th Cir. 2017) (clinical interviews and mental status evaluations are “objective measures”
23 which “cannot be discounted as a self-report”); *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir.

2014) (internal citation omitted) (“when an opinion is not more heavily based on a patient’s self-reports than on clinical observations, there is no evidentiary basis for rejecting the opinion.”). Based on a review of the relevant record, the Court concludes that Dr. Czysz’s opinion of plaintiff’s limitations was consistent with his clinical findings and not largely based on plaintiff’s self-reported symptoms. Thus, the ALJ’s finding that Dr. Czysz’s assessment was not supported by his clinical findings and based largely on plaintiff’s self-reported symptoms is not supported by substantial evidence. *See Lester*, 81 F.3d at 830-31.

2. *Plaintiff’s Concurrent and Historical Substance Abuse*

The ALJ afforded less weight to Dr. Czysz’s opinion of plaintiff’s marked limitations because Dr. Czysz did not mention plaintiff’s substance abuse in spite of the fact that the evaluation forms requested such information and plaintiff’s treatment records showed that substance abuse affected his mental health. AR 29. Plaintiff argues that the ALJ’s finding is unsupported, because Dr. Czysz concluded that plaintiff’s impairments were not primarily the result of alcohol or drug use within the past 60 days and that the current impairments would persist event with sixty days of sobriety. Dkt. 10 at 12 (citing AR 1015). Defendant argues that the ALJ reasonably found plaintiff’s contemporaneous substance abuse likely affected his presentation to Dr. Czysz.

An ALJ may afford less weight to a medical opinion based on a claimant’s contemporaneous substance use. *See Morgan v. Comm’r. Soc. Sec. Admin.*, 169 F.3d 595, 603 (9th Cir. 1999) (affirming where the ALJ “discounted the results of the psychological testing conducted by the examining psychologist based on [the claimant’s] alcohol use and his ‘not entirely credible’ testimony”); *Andrews v. Shalala*, 53 F.3d 1035, 1042 (9th Cir. 1995) (affirming

1 where the ALJ found a psychologist's conclusions "unreliable because of [the claimant's]
2 contemporaneous substance abuse").

3 In this case, plaintiff reported to Dr. Czysz that he had not used any illicit opiates since
4 2005. AR 529, 1012. Yet there are documents in plaintiff's medical record showing that from
5 2009 to 2015 plaintiff had methadone treatment and withdrawal, presented to the emergency
6 department with abscesses secondary to injection drug use, presented with an altered mental
7 status at the emergency department, presented to the emergency department for treatment after
8 excessive drinking, and reported alcohol and heroin abuse. AR 586, 487, 581, 594, 599-600, 637,
9 641, 691, 743, 763, 835-866, 974, 1001-04, 1071, 1079, 1083. Therefore, Dr. Czysz's opinion
10 regarding the materiality of plaintiff's substance abuse conflicts with other evidence in the
11 record. *See Oviatt v. Comm'r of Soc. Sec. Admin.*, 303 F. App'x 519 at *2 (9th Cir. 2008)
12 (unpublished) (affirming where psychologist's failure to review medical records resulted in a
13 lack of awareness about the plaintiff's history of drug use). Thus, this is a valid reason, supported
14 by substantial evidence, to reject Dr. Czysz's opinion with respect to substance abuse as a
15 possible cause of symptoms.

16 3. Length of Contact

17 Third, the ALJ found that Dr. Czysz's evaluations only involved brief contact, and were
18 not for treatment purposes. AR 29. Plaintiff argues that this claim is unsupported because a
19 consultative examination ordered by defendant constitutes substantial evidence even while it is a
20 one-time assessment. Defendant does not address this argument.

21 In order to invalidate the opinion of an examining physician that is contradicted by other
22 evidence, the ALJ was required to state specific and legitimate reasons that are supported by
23 substantial evidence in the record. *Lester*, 81 F.3d at 830 (internal citations omitted). However,
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1 the ALJ's decision lacks any substantive explanation as to why Dr. Czysz's "brief" evaluations
2 of plaintiff is a specific and legitimate reason to discount his opinion. If the ALJ could reject an
3 opinion simply because it was based on "brief contact" and not for the purpose of seeking
4 treatment, almost every examining opinion could be rejected for this reason. *See Williams v.*
5 *Colvin*, 24 F. Supp. 3d 901, 914 (N.D. Cal. 2014) ("The fact of a one-time examination, without
6 any analysis or assessment as to the nature and quality of that examination, is not a sufficient
7 basis for the ALJ's decision to reject Dr. Johnson's opinion."). Without more, this is not a
8 specific and legitimate reason supported by substantial evidence to discredit Dr. Czysz's opinion.

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10 4. *Improvement with Treatment*

11 The ALJ also rejected Dr. Czysz's opinion because Dr. Czysz was optimistic about
12 plaintiff's recovery, believed vocational training could eliminate barriers to employment, and
13 opined plaintiff's impairments would improve within a short duration of treatment. AR 29.
14 Although neither party addresses this finding, *see* Dkts. 10, 11, the Court notes that the Ninth
15 Circuit has found that, particularly where mental illness is involved, periods of improvement do
16 not necessarily mean that the claimant's impairments no longer affect his workplace functioning.
17 *See Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014). Such observations must be read in
18 the context of the overall diagnostic picture. *Id.* Symptom-free periods are not inconsistent with
19 disability. *Id.* (citing *Lester*, 81 F.3d at 833).

20 Therefore, Dr. Czysz's opinion regarding plaintiff's potential for improvement with
21 treatment does not undermine Dr. Czysz's opinion that plaintiff's impairments render him unable
22 to work. *See id.* Moreover, the ALJ provided no meaningful analysis nor did he explain why the
23 opinions were somehow contradictory. AR 28. Without more, this is not a specific and legitimate
24 reason supported by substantial evidence to discount Dr. Czysz's opinion.
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The Ninth Circuit has confirmed that, “[l]ong-standing principles of administrative law require us to review the ALJ’s decision based on the reasoning and actual findings offered by the ALJ - - not *post hoc* rationalizations that attempt to intuit what the adjudicator may have been thinking.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1225-26 (9th Cir. 2009) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (other citation omitted)); *see also Molina*, 674 F.3d at 1121 (“we may not uphold an agency’s decision on a ground not actually relied on by the agency”) (citing *Chenery Corp.*, 332 U.S. at 196). Therefore, this allegation is outside the scope of review and the Court will not consider this argument.

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1 and legitimate reasons supported the ALJ's decision to reject or give reduced weight to
2 examining physician's opinion).

3 c. Dr. Wilkinson, examining psychologist

4 Dr. Wilkinson completed a Washington State Department of Social and Health Services
5 psychological/psychiatric evaluation form on September 27, 2011. AR 404. Dr. Wilkinson
6 opined that plaintiff's limitations ranged from mild to marked, with marked limitations⁴ in his
7 ability to be aware of hazards/taking precautions, communicate effectively in a work
8 environment, and maintain appropriate behavior. AR 406-407. Dr. Wilkinson further opined that
9 plaintiff was not capable of work. AR 407.

10 The ALJ assigned partial weight to Dr. Wilkinson's opinion, reasoning that Dr.
11 Wilkinson's opinion: (1) relied mostly on plaintiff's subjective reporting; (2) was based on a
12 one-time assessment; (3) noted that plaintiff's mental health conditions began in 1993, but he did
13 not explain how plaintiff was able to engage in sustained employment for a few years between
14 1997 and 2002; and (4) noted that mental health treatment would improve plaintiff's ability to
15 work. AR 28.

16 1. *Plaintiff's Self-Reports*

17 Although Dr. Wilkinson's opinion was based in part on plaintiff's self-reports, Dr.
18 Wilkinson also relied on objective measures, including a clinical interview and an MSE. AR
19 404-411 (MSE at 408); *Tommasetti*, 533 F.3d at 1041 ("[An] ALJ may reject a treating
20 physician's opinion," but only "if it is based 'to a large extent' on a claimant's self-reports that
21 have been properly discounted as incredible.") (internal citations omitted).

24 ⁴ Defined as "very significant interference". AR 406.

1 During the clinical interview, Dr. Wilkinson observed symptoms of depression, anxiety,
2 voices, and alcohol dependency. AR 405. Dr. Wilkinson found that plaintiff had no motivation,
3 no energy, poor concentration, isolates himself, wants to sleep, obsesses cannot focus, and
4 cannot get organized, that his mind wanders, and that he is scared, jumpy, worried, and
5 distracted. AR 405. When asked what observations may have a bearing on plaintiff's ability to
6 perform during a normal work day, Dr. Wilkinson stated that plaintiff was a "[r]ather intense,
7 peculiar person who does a poor job of verbalizing and also quite poor at sharing internal events
8 and lacking insight." AR 407.

9 While defendant attempts to discount the MSE on the basis that it is simply one page of
10 handwritten notes about Dr. Wilkinson's examination, the functional limitations are based on
11 objective findings and on Dr. Wilkinson's own observations during the clinical interview. *See*
12 AR 406-07 ("gives up at some harder MSE cognitive tasks [e.g.] comprehension[,] "gets
13 distracted [e.g.] when asked to subtract 7s from 100s he subtracts quickly by 1s[,] "appears to
14 be too distracted [to learn new tasks][,]" "not able to persist at this time [to perform routine tasks
15 without undue supervision,]" "poor judgment ... not making good decisions[,] "too avoidant,
16 overly sensitive, phobic to work with the public[,] "would fare better without public contact[,] "
17 and "marked impairment to current behavior, depression, anxiety, confusion, poor decisions,
18 [and] judgment[.]"), AR 408.

19 Importantly, no part of Dr. Wilkinson's evaluation discredited or questioned plaintiff's
20 reports. *See* AR 404-411; *See Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1199-1200 (9th Cir.
21 2008)) ("an ALJ does not provide clear and convincing reasons for rejecting an examining
22 physician's opinion by questioning the credibility of the patient's complaints where the doctor
23 does not discredit those complaints and supports his ultimate opinion with his own
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1 observations”). These are objective measures, and the ALJ gave no specific and legitimate
2 reason for rejecting these findings. *See Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017)
3 (clinical interviews and mental status evaluations are “objective measures” which “cannot be
4 discounted as a self-report.”).

5 Based on a review of the relevant record, the Court concludes that Dr. Wilkinson’s
6 opinion of plaintiff’s limitations was not largely based on plaintiff’s self-reported symptoms.
7 Rather, Dr. Wilkinson provided a psychiatric evaluation based Dr. Wilkinson’s own
8 observations, the objective results of a clinical interview and MSE, and plaintiff’s self-reported
9 symptoms. *See Buck*, 869 F.3d at 1049. Thus, the ALJ’s finding that Dr. Wilkinson’s assessment
10 was not supported by clinical findings and based largely on plaintiff’s self-reported symptoms is
11 not supported by substantial evidence. *See Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996).

12 2. One-time Assessment

13 The ALJ also found that Dr. Wilkinson’s evaluation was only a “one-time assessment.”
14 AR 28. Plaintiff argues that the ALJ’s finding is unsupported because such examinations are
15 routinely relied upon by the Commissioner. Dkt. 10 at 15. Defendant does not address this
16 argument. *See* Dkt. 11. As discussed above, the fact that a physician conducted a one-time
17 examination, is not sufficient to reject that opinion. *See Williams v. Colvin*, 24 F. Supp. 3d 901,
18 914 (N.D. Cal. 2014). Here, the ALJ failed to discuss the quality or nature of the examination,
19 and his decision lacks any substantive explanation as to why Dr. Wilkinson’s one-time
20 assessment is a specific and legitimate reason to discount his opinion. Without more, this is not a
21 specific and legitimate reason supported by substantial evidence to discredit Dr. Wilkinson’s
22 opinion.

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An ALJ may reject a medical opinion when the examination findings contained therein are inconsistent with the medical source's conclusion. *Johnson v. Shalala*, 60 F.3d 1428, 1433 (9th Cir. 1995). Here, however, it is unclear whether Dr. Wilkinson's findings as a whole were inconsistent with his conclusion. For example, the record does not show whether limitations existed when plaintiff's conditions first began in 1993, or (assuming for purposes of this analysis that limitations were present) how severe the limitations were at that time. *See* AR 28, 404-411. Nor is there evidence to show whether plaintiff's conditions improved between 1997 and 2002. *See* AR 28, 404-411. Thus, in the absence of evidence that would give context, this is not a specific and legitimate reason supported by substantial evidence to reject Dr. Wilkinson's opinion.

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As discussed above, mental illness may not involve a consistent set of symptoms and the existence of some periods of improvement do not necessarily mean that a claimant's impairments no longer affect his or her workplace functioning. *See Ghanim v. Colvin*, 763 F.3d 1154, 1162

1 (9th Cir. 2014). Rather, such observations must be considered along with the overall diagnostic
2 picture. *Id.* Symptom-free periods in the record would not inevitably lead to a conclusion that
3 there is no disability. *Id.* Here, the evidence that treatment led to time periods of improvement
4 does not undermine Dr. Wilkinson’s opinion concerning plaintiff’s impairments and how those
5 symptoms cause him to become unable to work. *See id.* Moreover, the ALJ did not provide any
6 meaningful analysis or explain why this evidence contradicted Dr. Wilkinson’s opinion. AR 28.
7 Therefore, the ALJ erred by failing to provide a specific and legitimate reason supported by
8 substantial evidence to discount Dr. Wilkinson’s opinion.

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10 *5. Defendant’s Additional Arguments*

11 Defendant also argues that other medical evidence refuted Dr. Wilkinson’s opinion.
12 However, the ALJ did not reject Dr. Wilkinson’s opinion because of any inconsistency with the
13 objective medical evidence. *See* AR 28. Therefore, the Court will not consider this argument.
14 *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1225-26 (9th Cir. 2009) (“Long-standing
15 principles of administrative law require us to review the ALJ’s decision based on the reasoning
16 and actual findings offered by the ALJ - - not *post hoc* rationalizations that attempt to intuit what
17 the adjudicator may have been thinking.”) (internal citations omitted).

18 *6. Harmless Error*

19 In the RFC assessment, the ALJ found, in relevant part, that plaintiff “is capable of
20 engaging in unskilled, repetitive, routine tasks in two-hour increments[,]” and that plaintiff could
21 engage in limited to incidental superficial contact with the public, occasional contact with
22 supervisors and work in proximity to but not in coordination with co-workers. AR 24. Dr.
23 Wilkinson opined that plaintiff was unable to work, and found marked limitations in plaintiff’s
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1 ability to be aware of normal hazards, communicate and perform effectively in a work setting
2 with public contact, and maintain appropriate behavior in a work setting. *See* AR 407.

3 If the ALJ had given full credit to Dr. Wilkinson's opinion, the RFC would have also
4 included additional limitations in plaintiff's cognitive and social factors. *See Molina*, 674 F.3d at
5 1115. Because the ALJ's decision finding no disability was based on the testimony of the
6 vocational expert – and the expert's testimony was based on an improper hypothetical – which in
7 turn was based on an improper RFC assessment, the error affected the ultimate disability
8 determination and was not harmless. *Stout v. Commissioner, Social Security Admin.*, 454 F.3d
9 1050, 1055 (9th Cir. 2006).

10 d. Dr. Mashburn, examining psychologist

11 On October 11, 2013, Dr. Mashburn conducted a consultative examination. AR 870. He
12 documented that his findings were based both on a review of medical records and on
13 psychological testing results, including those from a mental status examination. AR 870-874. Dr.
14 Mashburn diagnosed plaintiff with major depression with some psychotic features, rule out
15 substance abuse mood disorder, mild cognitive disorder -- due to post head injury, and
16 polysubstance abuse, reportedly in remission. AR 874. Dr. Mashburn assigned a GAF score of
17 49-52 and opined that while plaintiff was cognitively able to perform work activities, difficulties
18 may occur emotionally and socially. AR 874. Dr. Mashburn explained:

19 Cognitively, Mr. Flitcroft would be able to work simple and some detailed jobs
20 and complete those tasks in a timely manner. Complex tasks that change daily
would be difficult for this gentleman.

21 Emotionally and socially is where the difficulties occur. His mood disorder causes
22 more difficulties with reliability than any other factor. When he is actually on the
23 job or in a relationship, he appears to relate adequately and his avoidance of large
crowds does not appear to be significantly impairing his life, but his emotional
instability keeps him from seeking jobs, keeping them, etc. It should be noted,

1 with his history of drug and alcohol use, it is certainly difficult to know whether
2 some of the unreliability is due to episodes of using.

3 AR 874.

4 The ALJ assigned significant weight to Dr. Mashburn's opinion. AR 30. Plaintiff argues
5 that the ALJ failed to address Dr. Mashburn's statement that plaintiff's mood disorder causes
6 more difficulties with reliability than any other factor, and the impact of his emotional and social
7 stability on his ability to obtain and maintain a job. Plaintiff argues that the limitations discussed
8 by Dr. Mashburn "would clearly interfere with an ability to maintain substantial gainful activity."
9 Dkt. 10 at 16.

10 An ALJ's interpretations must be explained – the ALJ has a responsibility to show why
11 their analysis, rather than analysis conducted by the doctors, is correct. *Reddick v. Chater*, 157
12 F.3d 715, 725 (9th Cir. 1998) (citing *Embrey*, 849 F.2d at 421-22). The Commissioner "may not
13 reject 'significant probative evidence' without explanation." *Flores v. Shalala*, 49 F.3d 562, 570-
14 71 (9th Cir. 1995) (quoting *Vincent*, 739 F.2d at 1395 (internal citation omitted)). The "ALJ's
15 written decision must state reasons for disregarding [such] evidence." *Flores, supra*, 49 F.3d at
16 571. For example, "an ALJ cannot in its decision totally ignore a treating doctor and his or her
17 notes, without even mentioning them." *Marsh v. Colvin*, 792 F.3d 1170, 1172-73 (9th Cir. 2015)
18 (citing *Garrison*, 759 F.3d at 1012).

19 Here, Dr. Mashburn's opinion that plaintiff was not able to obtain or maintain
20 employment because of his emotional instability was significant probative evidence. The ALJ
21 erred in failing to discuss why this evidence was not being accepted. *See* AR 30. Although the
22 ALJ afforded significant weight to Dr. Mashburn's opinion, the ALJ did not discuss this portion
23 of Dr. Mashburn's opinion, and provided no reason to reject it. This is legal error. *See Reddick*,
24 157 F.3d at 725.

1 The Court also concludes that the error is not harmless. *Molina*, 674 F.3d at 1115
2 (internal citations omitted). In the RFC assessment, the ALJ found, in relevant part, that plaintiff
3 “is capable of engaging in unskilled, repetitive, routine tasks in two-hour increments[.]” AR 24.
4 The RFC found that plaintiff could engage in limited to incidental superficial contact with the
5 public, occasional contact with supervisors, and work in proximity to but not in coordination
6 with co-workers. AR 24. Dr. Mashburn opined that plaintiff’s emotional instability rendered him
7 unable to obtain or maintain work. *See* AR 874. If Dr. Mashburn’s opinion had been fully
8 accepted by the ALJ, it follows that the RFC would have included additional limitations relating
9 to plaintiff’s ability to engage in full time employment. As the ALJ’s ultimate determination
10 regarding disability was based on the testimony of the vocational expert on the basis of an
11 improper hypothetical, the error affected the ultimate disability determination and was not
12 harmless.

13 II. RFC, Hypothetical Questions and Step Five Findings

14 Plaintiff argues that due to the alleged errors, the RFC was not supported by substantial
15 evidence. Because the Court has concluded that the ALJ erred in reviewing the medical evidence
16 and that this matter should be reversed and remanded for further consideration on this basis, *see*
17 *supra*, section I, the remainder of the sequential disability evaluation process, including the RFC
18 assessment and step five, will need to be re-evaluated.

19 III. Remedy

20 “The decision whether to remand a case for additional evidence, or simply to award
21 benefits[.] is within the discretion of the court.” *Trevizo*, 871 F.3d at 682 (quoting *Sprague v.*
22 *Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). A direct award of benefits would be warranted if
23 the following conditions are met: First, the record has been fully developed; second, there would
24 be no useful purpose served by conducting further administrative proceedings; third, the ALJ’s
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1 reasons for rejecting evidence (claimant's testimony or medical opinion) are not legally
2 sufficient; fourth, if the evidence that was rejected by the ALJ were instead given full credit as
3 being true, then the ALJ would be required on remand to find that the claimant is disabled; and
4 fifth, the reviewing court has no serious doubts as to whether the claimant is disabled. *Leon v.*
5 *Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017) (amended January 25, 2018); *Revels*, 874 F.3d at
6 668.

7 If an ALJ makes an error and there is uncertainty and ambiguity in the record, the district
8 court should remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d 1041,
9 1045 (9th Cir. 2017) (amended January 25, 2018) (quoting *Treichler v. Comm'r of Social Sec.*
10 *Admin.*, 775 F.3d 1090, (9th Cir. 2014). If the district court concludes that additional proceedings
11 can remedy the errors that occurred in the original hearing, the case should be remanded for
12 further consideration. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017).

13 As discussed above, the ALJ failed to provide legally sufficient reasons for discounting
14 the opinions of Drs. Rowlett, Mashburn and Wilkinson. Accordingly, issues remain regarding the
15 medical evidence in the record concerning plaintiff's functional limitations, and therefore serious
16 doubt remains with respect to the disability determination. Accordingly, remand for further
17 consideration is warranted. Specifically, on remand the Commissioner shall re-evaluate the
18 medical evidence, including the opinions of Drs. Rowlett, Mashburn and Wilkinson, plaintiff's
19 residual functional capacity, plaintiff's ability to perform his past relevant work, and, if
20 necessary, plaintiff's ability to perform other jobs existing in significant numbers in the national
21 economy. Plaintiff has not challenged the ALJ's credibility finding regarding the plaintiff, and
22 the ALJ need not reconsider that finding.

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3 CONCLUSION

4 Based on the foregoing discussion, the Court concludes the ALJ improperly determined
5 plaintiff to be not disabled. Therefore, the ALJ's decision is reversed and remanded for further
6 administrative proceedings.

7 Dated this 15th day of August, 2018.

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11 Theresa L. Fricke
12 United States Magistrate Judge
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